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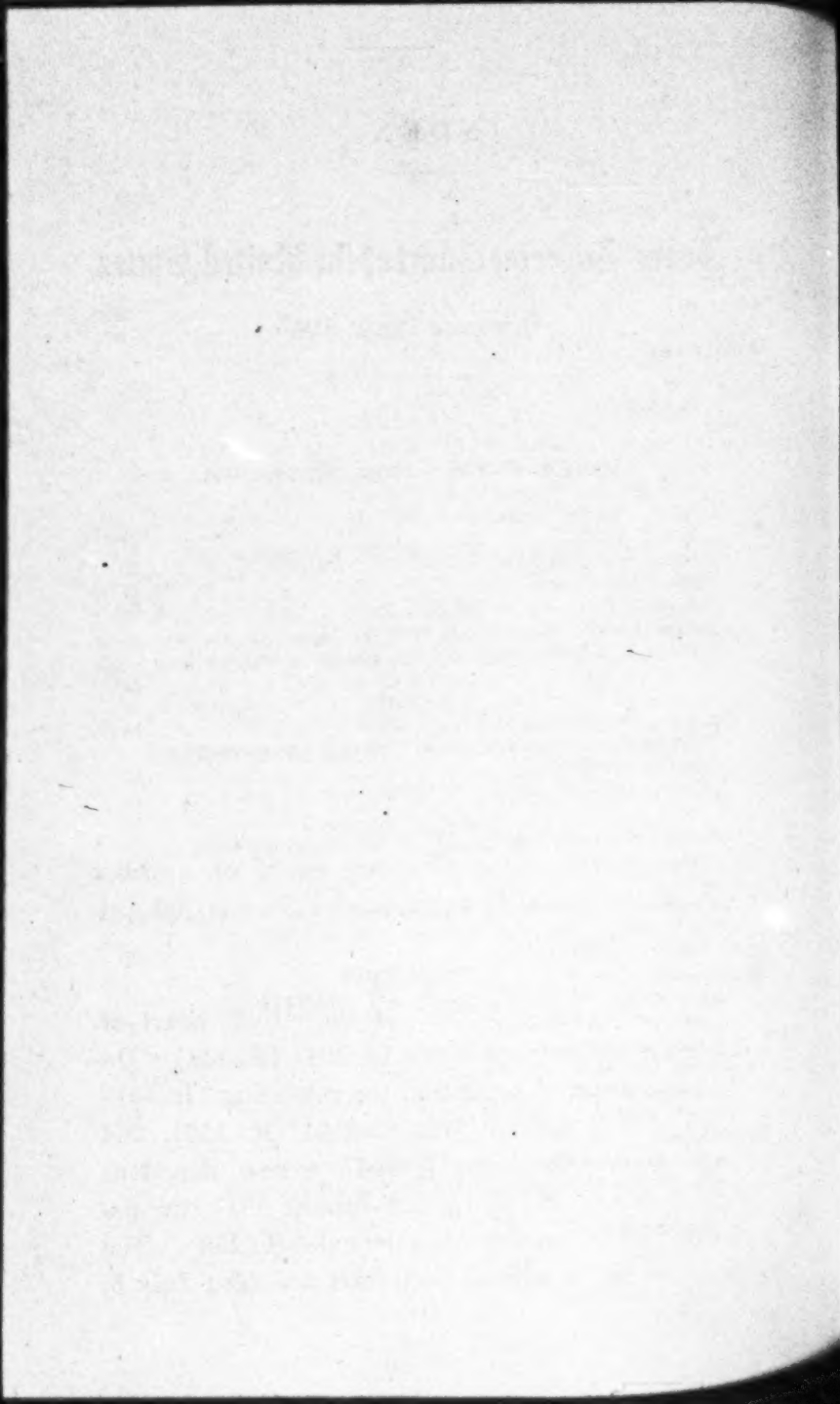
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(I)



In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 177

EVERY B. CHERETON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 155-156; see also, R. 150-155) has not yet been reported.

JURISDICTION

The original judgment of the circuit court of appeals was entered April 10, 1947 (R. 149). On consideration of a petition for rehearing (R. 151-154) that judgment was vacated (R. 155), and subsequently on June 5, 1947, a new judgment was entered (R. 155). On June 6, 1947, the petition for rehearing was denied (R. 156). The petition for a writ of certiorari was filed July 5,

1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether, in view of the conclusive evidence of petitioner's guilt and his failure to request such an instruction, his conviction for illegal possession of ration coupons should be reversed because the trial judge failed specifically to instruct the jury as to intent.

2. Whether the closing argument of the United States Attorney prejudicially referred to petitioner's failure to take the stand in his own defense.

3. Whether the trial judge abused his discretion in refusing to declare a mistrial requested by reason of jurors having read a newspaper article concerning petitioner.

4. Whether the trial court should have suppressed certain evidence on the ground that it was obtained as a result of an arrest asserted to have been illegal because the offense, a misdemeanor, was not committed in the presence of the arresting officer.

STATUTE AND REGULATIONS INVOLVED

Section 2 (a) (5) of the Second War Powers Act, 1942 (Act of March 27, 1942, c. 199, 56 Stat. 176, 50 U. S. C. App., Supp. V, § 633 (a) (5)) provides:

(5) Any person who willfully performs any act prohibited, or willfully fails to per-

form any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than \$10,000 or imprisoned for not more than one year, or both.

Section 1394.8177 of Ration Order 5-C (effective November 9, 1942, 7 F. R. 9135, 9156) provided, in pertinent part:

(b) No person shall transfer or assign and no person shall accept a transfer or assignment of any coupon book or any bulb, inventory or other coupon (whether or not such book was issued as a ration book and whether or not such coupon was issued as a ration or as part of a ration book) or other evidence, except in accordance with the provisions of Ration Order No. 5C.

(c) No person shall have in his possession any coupon book or bulk, inventory or other coupon (whether or not such book was issued as a ration book and whether or not such coupon was issued as a ration or as part of a ration book) or other evidence, except the person, or the agent of the person, to whom such book, coupon, or certificate was issued or by whom it was acquired in accordance with the provisions of Ration Order No. 5C.

STATEMENT

On March 1, 1946, an information was filed in the District Court for the Eastern District of

Michigan, charging that on June 15, 1945, petitioner "did unlawfully, wilfully and knowingly have in his possession certain ration coupons, to-wit: 148 gasoline ration coupons; 13 C-6 gasoline ration coupons, 74 C-7 gasoline ration coupons, and 61 T second-quarter, 1945 gasoline ration coupons, which had not been issued to him under any of the provisions of Rev. Ration Order No. 5-C, as amended," in violation of the Second War Powers Act, 1942, and Ration Order 5-C promulgated thereunder (R. 1-2). After a jury trial, petitioner was found guilty (R. 4) and sentenced to imprisonment for one year and to pay a fine of \$1,000 (R. 5). On appeal to the Circuit Court of Appeals for the Sixth Circuit, the conviction was affirmed (R. 155).

The evidence in support of the conviction may be briefly summarized as follows:

About 7:00 p. m., June 14, 1945, petitioner bought gasoline at a station operated by one Joseph John George in Detroit and surrendered to George coupons representing 80 gallons of gasoline, requesting George to give him credit for the unused balance (R. 13-14). George turned the coupons over and noticed that they had been steamed off a sheet. Petitioner told him that "he just come from Chicago and brought them stamps." He also told George that he wanted "1000 gallons a week for his cruiser, and the Government only give him 27 gallons, and he cannot operate it." George advised petitioner that

he could not do anything but that he would call the company and see what they could do for petitioner. It was agreed that petitioner would return for an answer at 10:00 a. m. the next day. (R. 14.) When petitioner left the station, George contacted a local O. P. A. enforcement official, advised him of the incident, and surrendered the coupons petitioner had given him (R. 14-15, 28). The license numbers endorsed on the coupons were not the same as those on petitioner's automobile (R. 15).¹

As a result of George's report, arrangements were made for an O. P. A. investigator and a city detective to be present when petitioner returned to George's station (R. 15). When petitioner arrived at the station, between 10 and 11 a. m. on June 15, George introduced the O. P. A. in-

¹ Section 1394.8004 of Ration Order 5-C provided in part as follows (7 F. R. 9148):

"(d) Each person to whom a ration book has heretofore been or is hereafter issued shall clearly write in ink (or in the case of interchangeable coupon books issued for official or fleet vehicles, shall clearly write in ink or stamp in ink) on the reverse side of each coupon issued to him, before accepting a transfer of gasoline in exchange for such coupon, the following information:

"(1) In the case of A, B, C, D, T-1 or T-2 books; license number and state of registration of the vehicle for which such ration was issued, except that in the case of interchangeable coupon books issued for official or fleet vehicles the information shall be the official or fleet designation (or the Certificate of War Necessity number in the case of commercial vehicles not bearing fleet designations) and the state and city or town in which the principal office of the fleet operator is located."

vestigator to him as the gasoline company man (R. 15, 16, 54). Petitioner said he wanted to get some gasoline for his yacht (R. 16, 48), and when the investigator asked what kind of coupons he had, petitioner pulled out an envelope full of loose² coupons from which the investigator took two coupons which both he and George observed were "steamers" or used coupons which had been torn from gummed sheets (R. 16, 43-44).³ At that point the city detective came out of the ladies rest room from which he had observed the foregoing occurrences by means of reflections from a wall mirror of the rest room the door of which was open about one foot (R. 54). The detective took the envelope out of petitioner's hand and

² Section 1394.8153 of Ration Order 5-C provided in pertinent part (7 F. R. 9153):

"Transfer may be made and accepted in exchange for coupons contained in Class A, B, C, D, T-1, or T-2 books, only under the following conditions:

"(1) At the time of transfer, the transferor must require presentation of the coupon book and must detach therefrom coupons having an aggregate unit value equal to the amount of gasoline transferred: *Provided*, That if the transferee is able to accept only a portion of the amount of gasoline represented by the unit value of a coupon, the transferor shall nevertheless detach an entire coupon. No transfer may be made pursuant to this paragraph in exchange for a coupon detached prior to the presentation of the coupon book to the transferor."

³ An O. P. A. official testified that "steamers" were coupons which had already been surrendered for gasoline and thus had fulfilled their legal function and which were thereafter steamed or torn from official gummed sheets to which they had been attached by the seller for surrender to and destruction by O. P. A. (R. 28-30).

placed him under arrest (R. 54, 16, 27). Subsequently, the contents of the envelope were carefully examined and were disclosed to include 87 C and 61 T⁴ gasoline coupons, all of which were originally issued for the Chicago area, bore Illinois license numbers and were "steamers" (R. 55, 56, 58-59, 34).

The coupons were not introduced in evidence because after they had been checked and laid aside in the O. P. A. offices awaiting petitioner's trial, they disappeared (R. 39). However, the fact that they were "steamers" or used coupons was fully confirmed, as described above, by the testimony of the O. P. A. officials, the detective, and George. Moreover, the O. P. A. investigator testified that such coupons would not have been issued to petitioner or his company in the form in which he found them and that their condition indicated they were stolen. (R. 53.) Additionally, the detective testified that after he had arrested petitioner and advised him that he "was a police officer, as he already knew, and that he did not have to talk to me, but what he did tell me I could testify to in court" (R. 55), petitioner told him (R. 58-59),

he was the owner of a cruiser. He gave me the name of the cruiser, but I do not re-

⁴ "C" coupons were issued as supplemental rations for private automobiles, T coupons (transport rations) for commercial vehicles. See § 1394.7701 (a) and § 1394.7801 of Ration Order 5-C at 7 F. R. 9140, 9145.

member it. I think he told me it had two motors, 250 horsepower each motor, and that it consumed quite an amount of gasoline. He said that he had passed out word around where his boat was stored, that he wanted somebody to captain the boat, and a man had come into his office, and represented himself as a qualified person to captain this boat, and asked him if he had the position open.

Mr Chereton said he had told this man that due to the gas situation he had changed his mind. The man then pulled this envelope of stamps out, and threw it on top of his desk, and told him that if stamps was all that was bothering him he could do what everybody else did that was owning a boat, stamps could be gotten easy. And he left these stamps—he left this envelope of stamps in Mr. Chereton's possession for Mr. Chereton to verify as to whether or not they were counterfeits or not, or if they could be used. And he was to return within the next day or two or three days. I don't exactly remember when, and collect a sum of money, I believe to be \$35.00, for the contents of that envelope, and the job, if Mr. Chereton saw fit to hire him, with the understanding he could also procure more stamps as needed.

Mr. Deneen and myself then took Mr. Chereton to Mr. Lindbloom's office, where I initialled all of the stamps. Every one of the stamps was a steamer. I have had some experience with the police department

during gasoline rationing, and have seen similar coupons that have been used once, and then put back in traffic again.

The license numbers on these various coupons were all Illinois license numbers.

ARGUMENT

1. Notwithstanding that he concurred in the trial judge's instructions to the jury when they were given, petitioner now urges as a basis for reversal (Pet. 17-24) that they erroneously failed to include an instruction on wilfulness, which is an element of the offense defined by Section 2 (a) (5) of the Second War Powers Act (*supra*, pp. 2-3).

Consistently with Section 2 (a) (5) of the Second War Powers Act, the information charged petitioner with having "unlawfully, wilfully and knowingly" possessed described coupons in violation of Revised Ration Order No. 5-C, as amended (see Section 1394.8177, *supra*, p. 3). The evidence summarized in the Statement, *supra*, pp. 4-9, demonstrates quite conclusively, we think, that petitioner wilfully committed the offense charged in the information. In charging the jury, however, the trial judge unfortunately did not specifically refer to the element of wilfulness, and it is in this respect that petitioner now belatedly complains.

In instructing the jury, the trial judge stated (R. 108):

Members of the Jury, the charge in the information against the defendant at bar is that on the fifteenth day of June, 1945,

he had in his possession illegally gas coupons. Now, that is the gist and the substance of the charge.

The court then instructed concerning the presumption of innocence; the privilege of petitioner not to take the stand; the Government's burden to prove its case beyond a reasonable doubt; the jury's function as the trier of fact; and the court suggested guides in measuring credibility (R. 108-110). At this juncture, the court referred to the charge again, as follows (R. 110):

Now, as I said, the gist of this case is the charge that the defendant, on the day indicated, had in his possession illegal gasoline stamps. It is the obligation of the government to establish that in your minds beyond a reasonable doubt.

Other instructions not material here were given (R. 110-112), and the court then inquired of counsel (R. 112):

Have you any suggestions, gentlemen? If so, I will excuse the Jury while you discuss them.

Petitioner's counsel suggested "Just one," which is not here pertinent. Petitioner's counsel then suggested an additional instruction incorporating his requested instructions numbers 2 and 5, which emphasized that petitioner's purpose in possessing the coupons was not to be considered by the jury and that the Government was required to "disprove every reasonable theory consistent with the

innocence of the defendant" (R. 107). The Assistant United States Attorney suggested that the section of the regulation which petitioner was charged with violating should also be read to the jury. (R. 112-114.) The court then further instructed the jury in the manner requested by both counsel (R. 114-116), and after both attorneys assured the court that they were satisfied with the instructions (R. 116), the jury was allowed to retire.

While there can be no doubt that it would have been desirable for the trial judge specifically to have instructed the jury that wilfulness was an element of the offense charged in the information, the question here is whether, having affirmatively acquiesced in the charge which the court gave and not having requested an instruction on the subject, petitioner may now urge that he should have a new trial in which such an instruction will be given. Rule 30 of the Federal Rules of Criminal Procedure demonstrates, we submit, that petitioner is not now entitled to challenge the court's instructions. The rule provides:

RULE 30. Instructions.—At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel

of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Petitioner availed himself of the opportunity conferred by the rule to file written requests to charge, but he did not request the instruction he now urges should have been given. Petitioner affirmatively acquiesced in the court's charge; he did not object thereto before the jury retired to consider its verdict, stating distinctly the matter to which he objected and the grounds of his objection. In the circumstances, he has no right, under the rule, to object to the charge on the ground which he now urges. Particularly in view of the anxiety of the trial judge to instruct the jury in a manner satisfactory to petitioner, we think it is not unreasonable to insist that petitioner may not now complain of that which he earlier approved. *Johnson v. United States*, 318 U. S. 189, 199-201.

We are mindful of the fact that Rule 52 (b) empowers an appellate court to notice "Plain errors or defects affecting substantial rights" although "they were not brought to the attention

of the court." But this is not a case in which the error "seriously affects the fairness, integrity or public reputation of judicial proceedings," *Johnson v. United States, supra*, at p. 200. Indeed, if the jury believed the Government's witnesses—and its verdict shows that it did—it could have reached no conclusion other than that petitioner intentionally and purposefully possessed illicit gasoline ration coupons in an effort to obtain more than his share of rationed gasoline. The evidence showed that the coupons were obviously "steamers," that they bore license numbers other than petitioner's, that they were carried loose in an envelope rather than being attached to ration books as required, and that petitioner admitted that he had obtained them by devious means for the purpose of obtaining gasoline for his yacht. Such evidence shows not only that petitioner wittingly and intentionally possessed the illicit coupons, which is all that the statute requires,^{*} but also that his motive was evil. The case is not one, we submit, where intervention by this Court is essential in the interests of justice.

2. In his closing argument, the prosecutor made the following remarks (R. 137-138):

I will ask you members of the Jury to take this case from the evidence you have

^{*} *Kempe v. United States*, 151 F. 2d 680, 688 (C. C. A. 8); *Zimberg v. United States*, 142 F. 2d 132, 137 (C. C. A. 1), certiorari denied, 323 U. S. 712; *Gomila v. United States*, 159 F. 2d 1006, 1009 (C. C. A. 6), certiorari denied June 2, 1947.

heard from the witness-stand, and that is all. We are satisfied, the Government is satisfied to submit this case to you under the evidence that you heard from the mouths of the Government witnesses.

I have told you before, members of the Jury, and it bears repeating, how is their testimony controverted? These witnesses for the defendant, do they tell you one thing, does any witness for the defendant in this case tell you that one of these 148 coupons was lawfully in the possession of Mr. Chereton? No, no. They tell you, and put people on the stand here, that because of the fact they were getting coupons from the ODT, and there was this business of shuffling them around in Chicago, and sending them through the mail, you are supposed to infer from that, that maybe those were legal, and has anyone the temerity to get on the stand and tell you a very simple statement a very simple statement to the effect these 148 coupons are legal, and Mr. Chereton had a right to them.

Petitioner, though he did not at the time they were made object to the foregoing remarks on such a ground (see R. 138), now asserts that they improperly reflected on his failure to take the stand in his own defense (Pet. 25-29). However, in the context of the entire trial, it is apparent that no such reflection was intended or could fairly be inferred. Petitioner's defense consisted of an attempt to explain his possession

of the ration coupons through the testimony of certain employees of the company of which he was president (see R. 87-106). The assertedly objectionable remarks, when read together with the other portions of the prosecutor's closing argument referring to that defense testimony, obviously were solely and properly directed to the failure of these defense witnesses to explain in what way petitioner's possession of the "steamers" was legal. In any event, any possible prejudice that might otherwise have ensued from a misconstruction of the remarks such as advanced by petitioner was obviated by the trial judge's admonitory charge to the jury that they were to draw no unfavorable inference from the fact that petitioner did not take the stand (R. 108).

3. Petitioner next contends that the trial judge should have granted his motion for a mistrial when advised that a juror or jurors had, during the course of the trial, read a certain newspaper article reciting details of the trial and referring to a prior federal conviction of petitioner (Pet. 30-33).

When the situation was called to the trial judge's attention, he carefully probed the jury to determine what effect the article might have had upon them. The one or two jurors who read the article only vaguely recalled its contents. Moreover, they flatly assured the court that it

would not affect their judgment in the case. (R. 80-81.) Thereupon the trial judge stated (R. 82):

The COURT. All right. I think the motion will be denied. This jury isn't a new, inexperienced jury; they have been here since last November, and they have been instructed innumerable times of their absolute duty, in deciding cases from the evidence in court, and nothing else.

Counsel for the Government, counsel for the defendant, or the court itself, of course, has no control over what a newspaper may print; but the only thing we are interested in is that if that newspaper does print something concerning the case pending before any particular jury, is whether that jury has been affected detrimentally to the interests of the people in the case, to any degree. If it should happen that it was, of course, the duty of the court would be to dismiss you from further consideration of the case; but, as you have assured me that nothing you have read in any paper would in any way affect your ultimate judgment in this case, the motion will be denied. Proceed with the testimony.

We submit that the trial judge's determination was proper under the circumstances. The opportunity for prejudice by reason of the newspaper article raised no presumption that it existed. *Holt v. United States*, 218 U. S. 245, 251. And the trial judge was best able to determine, as he as-

siduously attempted to do, whether any prejudice did in fact result. Certainly, the fact that jurors have read an article commenting on a case or defendant before them should not be foundation, *ipso facto*, for their discharge, for the jury system, particularly in large metropolitan centers, cannot be administered so as to isolate jurors from all worldly contact and normal news sources during the many weeks or months in which they may be required to serve. *Holt v. United States*, *supra*; cf. *United States v. Keegan*, 141 F. 2d 248, 258 (C. C. A. 2), reversed on another ground, 325 U. S. 478. Accordingly, where, as here, the trial justice assured himself that no prejudicial impression had remained with the jurors as a result of reading the newspaper article in question, no abuse of discretion is shown in his refusal to declare a mistrial. *United States v. Carruthers*, 152 F. 2d 512, 519 (C. C. A. 7), certiorari denied, 327 U. S. 787.

4. Petitioner's last contention is that evidence adduced as a result of his arrest should have been suppressed at his trial because the offense in question, a misdemeanor, was not committed in the presence of the arresting officer (Pet. 33-37). This contention would appear foreclosed by the jury's verdict returned after unequivocal instructions to them that " * * * if you found that the officer was not justified in making the arrest, in other words, that there was not an offense being

committed in his presence, then there could be no justification for a verdict of guilty, no matter what developed from the subsequent observation, search or statement * * * (R. 111). Moreover, petitioner made no protest at the time the ration coupons were taken. Cf. *MacDaniel v. United States*, 294 Fed. 769, 773 (C. C. A. 6), certiorari denied, 264 U. S. 593; *Cardenti v. United States*, 24 F. 2d 782, 783 (C. C. A. 9); *Harkline v. United States*, 4 F. 2d 526, 527 (C. C. A. 8); *Patterson v. United States*, 31 F. 2d 737, 738 (C. C. A. 9).

In any event, petitioner's contention is without basis. His argument is bottomed on the assertion that when the city detective stepped out of his place of concealment, seized the envelope in which the ration coupons were contained, and arrested petitioner, the ration coupons were not visible to him. However, the officer testified that while petitioner and the O. P. A. investigator were talking, he "saw Mr. Chereton reach in his pocket and pull out this envelope. *I could see the stamps there*, and I reached over his shoulder and took them out of his hand." (R.-60.) [Italics supplied.] The ration coupons were, of course, the property of the United States, and its reclamation of that property, unlawfully in petitioner's possession, was not subject to the normal restraints against intrusion on one's privacy. *Davis v. United States*, 328 U. S. 582, 593. Moreover, the previous information and observations of the ar-

resting officer gave him full sensory perception if not ocular evidence of petitioner's possession of the coupons. Cf., e. g., *Davis v. United States*, *supra*, at 592; *Garske v. United States*, 1 F. 2d 620, 622, 623 (C. C. A. 8); *Scher v. United States*, 95 F. 2d 64, 65 (C. C. A. 6, affirmed, 305 U. S. 251). Accordingly, it is clear that the offense, illegal possession of ration coupons, was committed in the arresting officer's presence and that, therefore, the arrest was lawful and evidence obtained as a result thereof not subject to suppression.

CONCLUSION

The judgment below is clearly correct, and there is no occasion for review by this Court. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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AUGUST 1947.